Appendix A.

Pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act Feb. 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717-717w:

SECTION 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * * In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [56 Stat. 83; 15 U. S. C. § 717f (c)].

* * * * * * *

SECTION 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the oper-

ation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 83; 15 U. S. C. § 717f (e)].

Pertinent provision of the Regulations of the Federal Power Commission under the Natural Gas Act, 18 CFR § 157.28:

§ 157.28 Temporary authorizations.

"Upon the filing of an application for a certificate of public convenience and necessity under §§ 157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102 of this chapter, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however*, That this temporary authorization is applicable and available only subject to the following:

(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 90 days from the date on which

the temporary authorization is issued by the Commission unless otherwise ordered for good cause shown.

(b) It shall not apply unless such facilities as may be necessary to enable the purchaser of the gas or the person by whom the transportation is to be performed to accept delivery of such gas from the independent producer have been authorized by the Commission or are exempt from the need of such authorization by virtue of the provisions of § 2.55(d) of this chapter.

(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, inter alia: drainage, threatened loss of lease, flairing, economic hardship resulting from payment of shut-in royalties, or similar situations; (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization; and (3) a statement describing, generally, the facilities necessary to enable the purchaser to take delivery of the gas proposed to be sold or transported.

(d) [Revoked]

Appendix B.

Opinion and Judgment of U. S. Court of Appeals, District of Columbia Circuit.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17582

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
CONTINENTAL OIL COMPANY AND SUNRAY D X OIL COMPANY, SKELLY OIL COMPANY, SUN OIL COMPANY, GEORGE H. COATES, PRADO OIL & GAS COMPANY, PHILADELPHIA ELECTRIC COMPANY, INTERVENORS

No. 17627

CONTINENTAL OIL COMPANY AND SUNRAY D X OIL COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, AND LONG ISLAND LIGHTING COMPANY, INTERVENORS

No. 17628

THE UNITED GAS IMPROVEMENT COMPANY AND LONG ISLAND LIGHTING COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
SUN OIL COMPANY, SOUTH TEXAS NATURAL GAS GATHERING COMPANY, GEORGE H. COATES, SKELLY OIL COMPANY, CONTINENTAL OIL COMPANY, et al., PRADO OIL AND GAS COMPANY, AND PHILADELPHIA ELECTRIC COMPANY, INTERVENORS

No. 17859

PRADO OIL AND GAS COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, INTERVENOR

On Petitions to Review Orders of the Federal Power Commission

---

Decided January 23, 1964

Before FAHY, WASHINGTON and DANAHER, *Circuit Judges*.

FAHY, *Circuit Judge:* Continental Oil Co. and Sunray D X Oil Co., petitioners in No. 17627, and Prado Oil and Gas Co., petitioner in No. 17859, on May 15, 1959, and June 30, 160, respectively, entered into contracts with the South Texas Natural Gas Gathering Company for the sale of natural gas at a price of 16 cents per Mcf. This was part of a larger project involving sales by numerous other gas producers in Texas Railroad District No. 4 to South Texas, to be delivered to Transcontinental Gas Pipe Line Corporation, for resale in interstate commerce. Applications for approval by the Federal Power Commission of sales of the petitioning producers were first filed between May 1959 and January 1960. However, even before notice of these applications had been issued *ex parte* temporary certificates had been granted to most of the producer-applicants authorizing the immediate commencement of the sales at contract prices ranging from 9 to 17 cents per Mcf. None of these certificates provided for any refund should the contract prices subsequently be found to exceed the proper "in-line" price for the area.

After a hearing on the applications the Commission on November 22, 1960, approved the producers' proposed prices. The Public Service Commission of the State of New York, petitioner in No. 17582, sought a rehearing, contending that the proper "in-line" price for the particular area was 14.6 cents per Mcf. The Commission granted a rehearing and consolidated the above applications with thirty-five additional producer applications relating to the same project. Like the producers involved in the first stage of the proceedings these additional producer-applicants had been granted temporary operating certificates containing no refund provision. Hearings were once again held and on January 25, 1962, the Presiding Examiner

issued his preliminary statement approving the proposed sales at prices ranging from 16 to 17 cents. In doing so he relied heavily on the Commission's Statement of General Policy No. 61-1, issued September 28, 1960, in which, as a part of its area pricing policy, the Commission had set the area price for Texas Railroad District No. 4, the origin of the gas, at 18 cents per Mcf.

An August 30, 1962, the Commission issued its own final decision in which it found that the "in-line" price for the area with respect to contracts entered into prior to September 28, 1960, was 15 cents per Mcf.[1] Accordingly, it approved the sales in question on the condition that the price charged be not in excess of 15 cents.[2] It refused, however, to order a refund of the charges in excess of 15 cents collected under the temporary authorizations. The Commission was initially of the opinion that since no refund provision had been included in the temporary certificates there was "no basis for ordering refunds." In its later order of December 18, 1962, denying reconsideration, the Commission explained that it would be inequitable to require refunds when the temporary certificates contained no provision clearly apprising the producers of the risk in operating under a temporary certificate subject to a refund obligation.

---

[1] Of eighty-six related applications originally involved in the Commission proceedings only fifteen proposed contract prices were found to be "out of line"; and of the twelve producers whose certificates were conditioned by the Commission on a price reduction all but three, Continental, Sunray and Prado, have apparently accepted the Commission's ruling by not filing a petition for review.

[2] Simultaneously with this order the Commission issued its Fifth Amendment to Statement of General Policy No. 61-1 in which it reduced the area ceiling price level for Texas Railroad District No. 4 from 18 cents per Mcf. to 16 cents per Mcf.

In its final orders the Commission also declared that the provisions in the sales contracts obligating the purchaser to take or pay for a minimum volume of gas on an annual basis were subject to the Commission's final order in a pending rule making proceeding concerning "take or pay" provisions. The Commission subsequently modified this condition so that the producers would not be required to file "take or pay" provisions for less than eighty per cent of the annual contract qualities, regardless of the outcome of the rule making proceeding.

The producer petitioners in Nos. 17627 and 17859 seek review of the orders insofar as they condition approval of the proposed sales (a) on a reduction in the initial price to 15 cents and (b) on the outcome of the rule making proceedings regarding "take or pay" provisions. Petitioners in Nos. 17582 and 17628 seek review of the same orders insofar as they omit to require a refund of excess charges collected under the temporary certificates. Intervenors in Nos. 17582 and 17628 support the Commission in refusing to order refunds.[3]

The Fixing of An In-Line Price of 15 Cents as a Condition to the Permanent Certificates

The Commission was obliged to be guided by *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378 (1959), known as the *Cateo* decision. The Court there pointed out

[3] In No. 17628 intervenor The South Texas Natural Gas Gathering Company refers to a statement in the brief of petitioners in that case regarding the absence of a provision in its certificate for a "flow-through" of refunds. South Texas states it would agree voluntarily to pass along refunds should they result from this review proceeding, on the condition that petitioners and other customers of Transcontinental Gas Pipe Line Corporation agree that such refunds will be immediately and completely passed along by them to the ultimate consumers so that petitioners and other customers of Transcontinental would not receive a windfall as the result of South Texas' action.

that some of the provisions of the Act regarding rates, notably Sections 4 and 5, entail extremely long delays, calling upon the Commission in Section 7 proceedings to condition certificates by requiring an "in-line" initial price. Accordingly, in granting permanent certificates the Commission is to decide the "in-line" price. This the Commission did in the present cases, fixing it as of the date of the contracts under which the gas was to enter interstate commerce. It determined that the appropriate price for District No. 4 revolved around the situation prevailing there in the years 1958, 1959 and 1960. It considered as the most important evidence a study prepared by the Commission staff analyzing contract and price data for the years 1955 and later. Of the contracts thus analyzed none executed during the 1958 to 1960 period and under permanent certificates involved prices above 18 cents and the majority, involving also the greater volume of gas, were at prices between 14 and 15 cents. And the Commission noted that it had granted certificates for sales in the area during the three years mentioned at prices ranging down to 6 cents per Mcf.[4] In addition, as the opinion points out, nearly all the contracts with prices above 15 cents were subject to litigation. Being under a cloud they were eliminated from consideration. The Commission also placed under the same cloud, or in a suspect category, other contract prices above 15 cents which, though not themselves in litigation, appeared because of the higher prices to be subject to the same infirmities as those which were. The

[4] Continental contends this finds no support in the record. In its opinion on reconsideration the Commission adequately meets this objection by pointing out that the notice it took of prices ranging down to 6 cents "was not a part of the decisional process in determining the line but merely part of our explanation of the scope of the staff exhibit, which treated sales at prices of 14 cents and above. Therefore further evidence on this matter would not affect the basis of our decision."

Commission also gave less consideration to prices allowed under temporary certificates than under permanent certificates, because the former were issued ex parte and informally, without full investigation.

It cannot be seriously contended that the data upon which the Commission relied fails to support its determination of an "in-line" price of 15 cents. It is principally urged that the Commission erred in limiting, as above indicated, the evidence upon which it relied. We now consider these limitations.

As to the exclusion of prices under a cloud the Commission had the support of the opinions of the courts in *United Gas Improvement Co.* v. *FPC*, 283 F.2d 817, 824 (9th Cir. 1960), *cert. denied sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U. S. 881 (1961), and *United Gas Improvement Co.* v. *FPC*, 290 F.2d 133, 137 (5th Cir.), *cert. denied sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823 (1961); and see our opinion in *Pub. Serv. Comm'n* v. *FPC*, 109 U.S. App. D.C. 292, 295 n. 3, 287 F.2d 146, 149 n. 3 (1960), *cert. denied sub nom. Hope Natural Gas Co.* v. *Pub. Serv. Comm'n*, 365 U.S. 880, and *Shell Oil Co.* v. *Pub. Serv. Comm'n*, 365 U.S. 882 (1961). In the light of these authorities we do not sustain the challenge advanced on this ground. In any event the exclusion of the prices under a cloud does not undermine the validity of the "in-line" price determined by the Commission, considering the evidence in its entirety.

The producer-petitioners make special objection to the Commission's refusal to rely upon a number of sales at 16 to 17 cents made in 1955 and 1956 to the Coastal Transmission Corp. Since the Coastal sales were made before

the 1958 to 1960 period when the contracts in the present cases were entered into and since the majority of the subsequent sales in Texas Railroad District No. 4 were at less than 15 cents, the Commission could reasonably determine as it did that the Coastal sales did not establish a valid line of 16 to 17 cents for that area during the 1958 to 1960 period.

The Commission also pointed out that "the earlier Coastal sales were made to a new company that had neither been given a certificate nor was yet in operation, so may have resulted in higher prices than would have resulted from contracts with an established pipeline." The Commission substantiated this observation on appeal by pointing out that the staff exhibit showed for the 1955-1956 period when the earlier Coastal sales were made that other sales, involving a greater volume of gas, were made to a more established pipeline at prices below 15 cents.

Continental contends that the Commission erred in not considering certain costs and financial requirements, evidence with respect to which was presented to show the amount Continental would be required to receive to recoup its cash outlay with respect to one area of its production here involved, and in failing to consider evidence as to the industry's replacement costs of gas, submitted by Texaco[5] and adopted by the other producers. However, these are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for

[5] The contention in this regard is made by Prado as well as Continental.

by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated. See, for example, *United Gas Improvement Co.* v. *FPC*, *supra*, 283 F.2d at 823. Consideration of the proffered evidence was not essential. In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco*.

Prado contends in No. 1785 that the Commission failed to give adequate consideration to its own Statement of General Policy No. 61-1, as amended, issued September 28, 1960. By this Statement the Commission prescribed guide line initial prices for twenty-three producing areas. It said that in doing so it considered many factors, including cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, et cetera. The guide line initial price for Texas Railroad District No. 4 was 18 cents per Mcf. Thereafter, on August 30, 1962, concurrently with its opinion in No. 362, presently before us, the area initial price for said District was lowered to 16 cents per Mcf. Prado contends that the action of the Commission in conditioning the permanent certificates at a price level below either the 18 cents or 16 cents guide line price is arbitrary and discriminatory. But the area guide line price is only a guide line price; it is not an "in-line" price required by *Catco* to be determined with the issuance of permanent certificates under Section 7(c). As the Commission states, its Policy Statement was a guide to its future action and "cannot effect an automatic

approval of proposed rates, particularly where the contracts were entered into before the Policy Statement." The Commission could not have ignored altogether its own Policy Statement, but it was not required to be controlled thereby in deciding, in the Section 7 proceedings, that the in-line price should be fixed at a less amount on the basis of the evidence analyzed in its opinion.

A somewhat related contention is that the Commission erred in fixing the "in-line" price as of the date of the contracts rather than as of the later date of initial delivery of gas. The Commission answers that the execution of a contract is the significant act of a buyer and seller in determining price, and that the effect of this determination does not await deliveries. We think we must honor the discretion thus exercised by the Commission "to require that the gas sold be sold under contracts that were in-line as of the time they were executed," to adopt its language. The Commission cites *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corps.*, 350 U.S. 332 (1956), to the effect that rates are established initially by the companies by contract or otherwise. The Commission apparently made no general rule for all cases, for it states that "under the circumstances here" the contract prices must be in line as of the time the contracts were executed.

None of the attacks on the "in-line" determination gives the court a basis for holding it to be invalid; and since the data relied upon adequately supports the price condition of the permanent certificates such condition is approved. Contracts under permanent certificates at prices of not more than 15 cents, covering such a large volume of gas from the same area, and for the years which are most relevant, are so numerous that we cannot say that the Commission exceeded its authority in fixing the "in-line" price at 15 cents, notwithstanding its refusal to give

significant consideration to higher prices for earlier years, even though under permanent certificates.

The Take-Or-Pay Provision

The original condition in this regard reads:

> The certificates of all of the producer applicants . . . shall be conditioned so that the take-or-pay requirement in each contract is subject to the provisions of our final order in Docket No. R-199 as of the effective date of that order.

As we have said, in its decision on reconsideration the Commission modified this provision to read that "the producers shall not be required to file take-or-pay provisions for less than 80 per cent of the annual contract quantities."

Docket No. R-199 is the general rule-making proceeding to consider standardization of take-or-pay provisions in producer contracts. Any modification of such contracts which might be required as a result of the proceeding would be prospective only. Should the producers here involved be required to file modified provisions they could then obtain review. See *Midwestern Gas Transmission Co. v. FPC*, 292 F.2d 119 (5th Cir. 1961). The present impact of the proceeding in Docket No. R-199 is too tenuous and uncertain to require the court to pass now upon the validity of what might eventuate, or to hold invalid pursuit of the matter by the Commission. To do the latter would be to say that no modification of the questioned provisions can be validly accomplished. And to do this now would be to rule in the dark.[6]

---

[6] Petitioners in No. 17627 attack the validity of the Commission's Fifth Amendment to its Statement of General Policy No. 61-1. However, in determining the validity of the order under review we need not probe the validity of the Amendment; and there is no occasion now to pass upon the Amendment independently of those orders.

The Refund Issue

Petitioners, Public Service Commission of New York, United Gas Improvement Company and Long Island Lighting Company, intervenors before the Commission, contend in Nos. 17582 and 17628 that the Commission is under legal obligation to require as a condition to its grant of permanent certificates that the producers refund that portion of the charges they have collected under temporary certificates in excess of the maximum initial price found by the Commission to be required by the public convenience and necessity.

We consider first the producers' contention that the issuance of the temporary certificates were appealable orders and that the failure of petitioners in Nos. 17582 and 17628 to seek review thereof precludes the relief they now seek, citing *Texaco, Inc.* v. *FPC*, 290 F.2d 149, 156-57 (5th Cir. 1961). But there the challenged conditions were in the temporary certificates. The Court held that if those conditions were deemed to be invalid the question should have been raised before the challenging producers accepted the certificates. "This is true because the failure of petitioners to appeal from the order granting the conditions within the time provided for appeals in Section 19(b) of the Natural Gas Act . . . deprives this court of jurisdiction to entertain a petition to review this order. Clearly, the order granting the temporary certificates, when it embodied the conditions now complained of was an order which then aggrieved the petitioners." *Id.* at 156-57.

The situation here is significantly different. It is true the present petitioners in a loose sense may be said to have been aggrieved by the absence of a refund condition in the temporary certificates, for such a condition would have strengthened their position; but in a jurisdic-

tional sense their aggrievement is with the absence of a refund requirement in the permanent certificates over which we now have jurisdiction. Once this absence became final before the Commission timely review was sought. In this situation we think it is open to petitioners to obtain now a decision on the refund issue.

Coming to the merits the producer intervenors say a refund condition is beyond the Commission's statutory power. As to this we may say initially that our statement in *Atlantic Ref. Co.* v. *FPC*, ... U.S. App. D.C. ....., 316 F.2d 677, 679 (1963), that there is no mechanism for refund of overcharges under Section 7 is not a holding that a refund may never be required when a permanent certificate takes over from a temporary one, an issue not there considered.

The producers argue that in any event refunds may not be required because the Commission lacks power "to set retroactive rates or award reparations," citing *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 309-10 (4th Cir. 1943), *rev'd on other grounds*, 320 U.S. 591 (1944). But there the Court was referring to the power of the Commission with respect to rates which had become unconditionally effective when filed, subject to being changed only prospectively in a proceeding under Sections 4 or 5(a) of the Act. The Court was not ruling upon the power of the Commission to condition a permanent certificate by requiring refunds of excessive prices charged and received under temporary certificates.[7] We think it is clear that a refund can be required when the temporary certificate is so conditioned. The serious question is whether it can

---

[7] As to the power see *Texaco, Inc.* v. *FPC*, 290 F. 2d 149, 156 (5th Cir. 1961); *Pure Oil Co.* v. *FPC*, 292 F. 2d 350, 352-54 (7th Cir. 1961). Compare, however, *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 Fd 2d 404 (10th Cir. 1959).

be required when the temporary certificate is not so conditioned.

As to this the Commission itself, though it did not require refunds in these cases, does not disclaim the power. The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity. The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise, the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates.

Section 7(e) provides, "The Commission shall have the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." 56 Stat. 84 (1942), 15 U.S.C. § 717(f)(e) (1958). And the temporary certificates before us provide:

> This acceptance for filing shall not be construed as constituting approval of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in the rate filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which may be made in the final disposition of this proceeding or any other final

ings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

* * * * * * *

This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate application as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

These provisions, all else aside, amply support authority for conditioning the permanent certificates by a refund requirement. As we have indicated, to order refund of rates found to be excessive is not an unusual remedy; and it is not unavailable under the Natural Gas Act due to the fact that in some instances the parties are not explicitly notified early in the proceedings that such a remedy may be imposed.[8]

---

[8] The producers rely upon the Tenth Circuit's decision in *Sunray Mid-Continent Oil Co.* v. *FPC*, 270 F.2d 404 (1959). The Court there held that even in attaching a refund condition to a temporary certificate the Commission must limit it by setting a price at or below which the producers can sell without risk of subsequent refund order. The Court felt that without such a limit on the refund obligation the Commission's grant of temporary authority was too vague to allow the producers to decide intelligently whether to accept the Commission's conditional grant and thereby commit its gas reserves to interstate commerce.

To the extent that our decision may be inconsistent with *Sunray* we are constrained respectfully to disagree with the latter. Moreover, it should also be pointed out that as a practical matter the producers in this case were relatively assured of being able to sell their gas without risk of subsequent refund at a price of 14.6 cents per Mcf., the price which PSC and the other consumer interests originally urged as the proper in-line price.

The existence of the power, however, does not mean that its exercise is mandatory, as petitioners in Nos. 17582 and 17628 assert. Here we follow the standard adopted by the Commission, namely, the standard of equity — that is, the issue of a refund in the present circumstances turns upon equitable considerations. But we do not follow the Commission in holding also that the sole and decisive equitable consideration here is the absence of a refund requirement in the temporary certificates. That would amount to saying that in the absence of such a condition in the temporary certificates refunds may not be required, a position we cannot accept. We recognize the Commission's duty to consider the extent to which a refund obligation in the absence of prior warning will, by increasing the risk producers must bear, affect the quantity and continuity of the supply of gas and thus have an adverse effect on the interests of consumers. But there are public interest factors of equity which must be weighed along with the effect of mere absence of a refund condition in the temporary certificates. One of these is the very fact that excessive prices were obtained while the proceedings pended, and after it was known an "in-line" price above 14.6 cents was being protested. See note 8-*infra*. The public interest, as represented by the consumer interest, is not necessarily, or entirely, offset by the absence of an explicit refund condition in the temporary certificates, especially when those certificates contained the general conditions to which we have herein above referred. We do not attempt an enumeration of all equitable considerations involved. These are better left for at least initial Commission consideration in all the circumstances. We do hold, however, that the mere absence of the condition in the temporary certificates is insufficient to cast the full burden of excessive charges upon

the consuming interests. There must be, with the assistance of the parties, a broader and more penetrating analysis and consideration of the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion.

The refund issue requires further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates.

Nos. 17627 and 17859 affirmed. Nos. 17582 and 17628 remanded for further proceedings consistent with this opinion.

Appendix C.

Opinion of U. S. Court of Appeals, Tenth Circuit.

SUNRAY MID-CONTINENT OIL COMPANY, Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent (two cases).

Nos. 6043, 6061.

United States Court of Appeals

Tenth Circuit.

Sept. 1, 1959.

Rehearing Denied Sept. 28, 1959.

Before BRATTON, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

These two cases were consolidated on review upon the representation that the determination of a single question of law would be dispositive of both cases, that question being: Can the Federal Power Commission impose conditions upon the grant of a temporary certificate of public convenience and necessity? Our study indicates that although the stated question is present in each case separate consideration of the cases is necessary because of factual differences of legal significance.

No. 6043. The Petitioner, an independent producer of natural gas, in conjunction with applications for permanent certificates of convenience and necessity for the sale of

gas, sought temporary authorization from the Commission to initiate such sales pending determination of the applications for permanent certificates. The temporary authority was sought pursuant to the statutory authority granted the Commission by Section 7(c) of the Natural Gas Act, 15 U.S.C.A. § 717 et seq., and in full compliance with Commission regulation 157.28.[1] Authorization to begin tempor-

[1] 157.28 Temporary authorizations.

"Upon the filing of an application for a certificate of public convenience and necessity under §§157.23 to 157.27, there also having been filed a rate schedule under §§ 154.91 through 154.102, an independent producer, in the event of an emergency that does not involve immediate danger to life or property, may initiate the sale or transportation of natural gas in interstate commerce and continue such sale or transportation pending final Commission action under Sections 4 and 7 of the Natural Gas Act and without prejudice to such rate or other condition as may be attached to the issuance of the certificate: *Provided, however*, That this temporary authorization is applicable and available only subject to the following:

"(a) It does not apply to termination of any sale or transportation or with respect to service proposed to commence more than 30 days from the date of the filing of the statement required in paragraph (c) of this section.

"(b) It does not apply unless the purchaser of the gas or the person for whom the transportation is to be performed has been authorized to construct and operate such facilities as may be necessary to enable him to accept delivery of such gas from the independent producer.

"(c) As part of its application hereunder, or separately, the applicant independent producer must file or have on file (1) a statement of intention to invoke this section, setting forth the facts constituting the emergency requiring such action, which emergency may include, *inter alia*, drainage, threatened loss of lease, flaring, economic hardship resulting from payment of shut-in royalties, or similar situations; and (2) a statement identifying the contract tendered as the rate schedule intended to be effective for the sale or transportation under this temporary authorization.

"(d) Notice by the Secretary of the acceptance of the rate filing and the statements made under this section shall constitute a waiver by the Commission of the 30-day advance filing requirements of §§ 154.92(b) or 154.94(b), and the proposed temporary sales or transportation may proceed forthwith."

ary service was initially denied by the Commission but, after protest by Sunray, was granted by letter order dated January 30, 1958. The letter of authorization contained the following statement:

> "This constitutes all requisite temporary authorization to commence the sale of gas, but such authorization and acceptance of the rate schedule are without prejudice to such final disposition of the certificate applications as the record may require and furthermore, *once service is commenced under this authorization it may not be discontinued without permission of the Commission issued pursuant to the Natural Gas Act.*" (Emphasis added.)

Sunray initiated deliveries upon receipt of the Commission letter order but informed the Commission by letter that:

> "Accordingly, Sunray * * * will only continue such sale * * * pending final Commission action under Sections 4 and 7 of the Natural Gas Act upon the respective applications for certificates of public convenience and necessity covering such sales. Sunray retains its right to accept or reject such certificates of public convenience and necessity as may be issued and to cease deliveries of gas in the event final action of the Commission on said applications for certificates of public convenience and necessity does not grant certificates of public convenience and necessity in accordance with the said applications."

After receipt of this letter from Sunray, the Commission rescinded its grant of temporary authority asserting that Sunray had evinced an unwillingness to comply with the Commission's lawful authority. Thereafter, ex parte, the Commission reinstated the temporary authorization, this time stating as its reason that its order of rescission had been premised upon the erroneous belief that Sunray had

not initiated deliveries so as to affect public convenience and necessity in such aspect. The reinstatement order reiterated the Commission's earlier contention that Sunray could not terminate its service except by express permission of the Commission. It is in opposition to this contention that Sunray brings the cause to this court after unsuccessfully seeking a rehearing before the Commission.

[1] The right of this court to review orders of the Federal Power Commission is limited by Sec. 19(b) of the Natural Gas Act to instances where the petitioner is presently aggrieved by the imposition of such orders. This compulsion leads us to hold that the present petition is premature. The able and comprehensive presentation of counsel, pointing to the complexities of right and duty that may occur if Sunray can lawfully be required to furnish service under a temporary authorization extended beyond determination of its application for a permanent certificate (as the Commission apparently contends), or if Sunray can arbitrarily reject a permanent certificate and thereupon cease service under its temporary authorization and as a matter of right (as Sunray contends), considers but eventualities. Sunray is currently selling its gas and has made no affirmative effort to cease. The Commission has made no objection to the status quo. Regardless of Sunray's present apprehension and the Commission's present warnings it will take further administrative action to create an actual grievance. Under these circumstances, it is obvious that "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 757, 83 L.Ed. 1147, and hence is not reviewable under Sec. 19(b), 15 U.S.C.A. § 717r; see Federal Power Commission v. Hope Natural Gas Co., 320 U.S.

591, 64 S.Ct. 281, 88 L.Ed. 333. If, as Sunray contends the Commission has no power to condition temporary certificates or has imposed an unlawful condition, the actions have no present impact upon Sunray. For this reason, the appeal in Case No. 6043 is dismissed.

No. 6061. Here again Sunray applied to the Commission for temporary authorization to sell gas pending final determination of its application for a permanent certificate of public convenience and necessity. By letter order dated September 17, 1958, the application for temporary authority was accepted by the Commission:

> "* * * subject to the condition that the price received by Sunray for its interest in the production from the jointly owned lease here involved will be that ultimately found to be just and reasonable in the operator's rate suspension proceedings, Docket Nos. G-11710 and G-14248.[2] In addition, Sunray shall submit a statement to this Commission as to its willingness to accept a permanent certificate of public convenience and necessity, in the subject, docket on the same basis and further conditioned to require the filing of an undertaking to assure refund to the purchaser of any portion of the increased rates found by the Commission in the aforementioned suspension proceedings not justified."[3]

Petitioner applied for rehearing which was denied, two commissioners dissenting. Thereafter on January 23, 1959, the Commission, *sua sponte*, modified its order denying rehearing by substituting, for the language cited above the following:

> "Such acceptance shall be subject to any conditions with respect to price which the Commission may law-

[2] These proceedings did not involve Sunray directly but were those of an operator selling from the same field.

[3] The letter orders also stated that once service was initiated it could not be discontinued without Commission authorization.

fully impose in issuing a certificate of public convenience and necessity in this Docket No. G-16134. In addition, Sunray shall submit a statement to this Commission as to its willingness to file an undertaking to assure refund of any portion of the difference, if any, between the proposed initial price of 16.4¢ per Mcf and the level of any price which the Commission may lawfully find to be required by the public convenience and necessity after hearing has been held with respect to the permanent certification of the sale of natural gas by Sunray."[4]

Sunray's second petition for rehearing was denied, one commissioner dissenting, and this petition for review followed. Sunray has not initiated service under the purported authority of the Commission order.

[2] Since the acceptance order of the Commission is clearly and unequivocally conditioned in such a manner as to immediately affect Sunray if that company should initiate temporary service it is apparent that petitioner can presently question the right of the Commission to condition temporary certificates at all and, in particular, as done in the instant case. The only authority for the issuance of temporary certificates lies in the proviso of Sec. 7(c) of the Natural Gas Act:

"*Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or [illegible]serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in

[4] See footnote 3.

the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83, (1942); 15 U.S.C.A. § 717f(c).]"

[3] The authority so granted is to be exercised summarily and no specific provision for review is contained in the statute. It follows that such power is limited only by the general purposes of the Natural Gas Act and by constitutional restrictions.

[4] The power of the Commission to impose conditions upon the issuance of permanent certificates is now well established by statute and case. Sec. 7(e), Natural Gas Act. Oklahoma Natural Gas Co. v. Federal Power Commission, 103 U.S.App.D.C. 256, 257 F.2d 634; Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312. And while no specific statutory authority exists for the imposition of conditions upon temporary certificates such authority seems to us to be inherent in the power to summarily grant or reject applications for temporary service pending final determination of applications for permanent certificates. See Colorado Interstate Gas Co. v. Federal Power Commission, 10 Cir., 142 F.2d 943. In most instances the power to summarily reject outright is more drastic than to conditionally grant. And certain it is that temporary service of gas is such an integral part of the overall function of public service as to be indistinguishable, in practical aspect, from permanent service from the standpoint of the consumer public. We hold, therefore, that the power of the Commission to issue temporary certificates under Sec. 7(c) of the Act is not limited to the power to accept or reject the application under the terms submitted by the applicant and that the Commission may tender a conditional acceptance. This court reached a similar result in Sunray Mid-Continent Oil Co. v. Federal Power Commission, 10 Cir., 239 F.2d 97

where a conditional application for a permanent certificate was considered. See also Sunray Mid-Continent Oil Co. v. Federal Power Comm., 10 Cir., 267 F.2d 471.

It does not follow that the broad power granted the Commission to summarily act upon applications for temporary certificates is an absolute power. If the Commission deems it in the public interest to accept an application conditionally such conditional acceptance must be in accord with the provisions of the Act and must meet the test of constitutional due process. By filing an application with the Commission the applicant does not submit irrevocably to the jurisdiction of the Commission. Atlantic Refining Co. v. Public Service Commission, supra. It is by the initiation of public service that the applicant's property becomes dedicated to that public service and the jurisdiction of the Commission's regulatory control within the statutory limits of the Act. The Act contemplates that the Commission need not accept the conditions contained in an application. Sunray Mid-Continent Oil Co. v. Federal Power Commission, supra; it likewise contemplates that the applicant need not accept conditions imposed by the Commission in its initial acceptance. Where conditions are imposed by the Commission the applicant has the free choice to accept or reject; to dedicate his property to public service or to refuse so to do; to submit to the jurisdiction of the Commission or to remain beyond the bounds of interstate commerce. This choice cannot be exercised by the applicant if the Commission says, in effect: "Sell your gas; collect your proposed initial price; we will later tell you if you can keep your collections; if we decide you cannot, you must assure refund by bond."

In Atlantic Refining Co. v. Public Service Commission, supra, the Supreme Court recognized the right and duty of the Commission to give consideration to the reasonableness

of a proposed price under Sec. 7 proceedings upon an application for a permanent certificate. The reasoning authorizing such consideration is equally applicable to the issuance of temporary certificates. Said that Court:

> "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.
>
> "This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra [350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373], but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. * * *" [360 U.S. 378, 79 S.Ct. 1255.]

[5] But in Atlantic, the applicant was tendered a certificate setting a firm initial rate with a condition allowing potential increase. In the instant case no initial rate is accepted. None is rejected. The applicant is merely asked to speculate as to what the ultimate temporary rate may be, to rely on the ultimate fairness of the final determina-

tion, and to meanwhile dedicate its gas to public service. The action of the Commission is neither an acceptance, rejection nor proper conditional acceptance of Sunray's application. It merely purports to hold in abeyance potential conditions. Under such circumstances Sunray is denied its right to have the Commission act upon its application with such certainty as to allow the exercise of choice upon Sunray's part.

The case is remanded for further proceedings.